

# EXHIBIT 3

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IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

APPLE INC.,  
-----Plaintiff, )  
vs. ) Case No.  
22-CV-1377-MN-  
JLH  
MASIMO CORP, et al., ) 22-CV-1378-MN-  
JLH  
-----Defendants.)

TRANSCRIPT OF MOTION HEARING

MOTION HEARING had before the Honorable  
Jennifer L. Hall, U.S.M.J., in Courtroom 2B on  
the 15th of June, 2023.

APPEARANCES

POTTER ANDERSON & CORROON LLP  
BY: DAVID MOORE, ESQ.  
BINDU PALAPURA, ESQ.

-and-

DESMARAIS LLP  
BY: KERRI-ANN LIMBECK, ESQ.  
JORDAN MALZ, ESQ.  
JAMIE KRINGSTEIN, ESQ.

-and-

WILMERHALE  
BY: JENNIFER MILICI, ESQ.  
MARK FORD, ESQ.

Counsel for Plaintiff

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(Appearances continued.)

PHILLIPS MCLAUGHLIN & HALL P.A.  
BY: JOHN PHILLIPS, ESQ.

-and-

KNOBBE MARTENS  
BY: ADAM POWELL, ESQ.  
STEVE LARSON, EQ.  
BRIAN HORNE, ESQ.

Counsel for Defendants

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THE COURT: So we're here today to  
hear motions in two cases. One is *Apple versus*  
*Masimo and Sound United*, and that's  
22-CV-1377-JLH. And the other is also *Apple*  
*versus Masimo and Sound United*. That's  
22-1378.

Let's have appearances starting with  
Plaintiff.

MR. MOORE: Good morning, Your Honor.  
David Moore from Potter Anderson on behalf of  
Apple. I'm joined by my partner Bindu  
Palapura. We're joined by our co-counsel from  
Desmarais Kerri-Ann Limbeck, Jordan Malz, and  
Jamie Kringstein. And from WilmerHale we're  
joined by Jannifer Milici and Mark Ford. And  
from Apple, Natalie Poe and Megan  
Thomas-Kennedy.

THE COURT: Hello. Good morning,  
everyone.

MR. PHILLIPS: Good morning, Your  
Honor. Jack Phillips of Phillips, McLaughlin,  
and Hall. With me in the courtroom are Steve  
Larson, Brian Horne, and Adam Powell from  
Knobbe Martens.

THE COURT: Good morning, everyone.

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It's my understanding that we have four motions  
pending, but we're only going to hear two of  
them today. And we've given each side  
15 minutes.

These are Plaintiff's motions, actually,  
so we'll hear from Plaintiff first.

MS. LIMBECK: Good morning, Your  
Honor. Kerri-Ann Limbeck on behalf of Apple.  
I'll be addressing inequitable conduct and my  
co-counsel will address antitrust and false  
advertising.

Masimo asserts inequitable conduct in  
both of these cases not against any counsel  
that actually prosecuted the asserted patents.  
Instead, they assert it against a mishmash of  
Apple as a whole, its chief of IP, unnamed  
others at Apple, and in the Design case only --  
all 21 named inventors collectively. Those  
allegations cannot meet the heightened pleading  
standard under Rule 9(b).

So starting with Apple's chief IP  
counsel, Jeffrey Meyers, Masimo did not and  
cannot plead that he even had a duty of  
disclosure in either the utility patents or the  
design patents because they did not plead that

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1 he's an inventor, that he's the attorney or  
2 agent that prosecuted or prepared the  
3 applications, or that he was substantively  
4 involved in prosecution. In the Utility case,  
10:06AM 5 its only allegation is that Mr. Meyers was an  
6 attorney of record for prosecution. Masimo  
7 pleads no facts and cites nothing in support of  
8 that bare allegation. In fact, it's false.

9 Mr. Meyer's name doesn't appear in the  
10:07AM 10 prosecutions.

11 In the Design case, Masimo pleads even  
12 less. Its only conclusory allegation is that  
13 Mr. Meyers had a duty to disclose, but Masimo  
14 did not plead that he was substantively  
10:07AM 15 involved in prosecution to give rise to that  
16 duty.

17 So additionally, Masimo did not and  
18 cannot plausibly plead in either case that  
19 Mr. Meyers had the requisite knowledge and  
10:07AM 20 specific intent. In both cases, Masimo fails  
21 to allege any facts from this Court could  
22 reasonably infer that Mr. Meyers actually knew  
23 of any of the references that they identified  
24 as being allegedly withheld from the Patent  
10:07AM 25 Office, let alone that Mr. Meyers knew of the

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1 specific technical disclosures within those  
2 references and deliberately withheld them with  
3 specific intent to deceive the Patent Office.  
4 The only conduct that Masimo actually  
10:08AM 5 attributes to Mr. Meyers in its pleading is  
6 that Mr. Meyers and others at Apple hired  
7 different law firms to do different things, to  
8 prosecute design patents, utility patents, and  
9 handle IPRs. That is not sufficient to  
10:08AM 10 plausibly plead that Mr. Meyers deliberately  
11 compartmentalized these particular prosecutions  
12 with intent to deceive the Patent Office, and  
13 that's why Masimo cannot cite a single case in  
14 support of that entirely novel theory. So  
10:08AM 15 Masimo's allegations against Mr. Meyers fail  
16 for those reasons.

17 Now, in the Design case specifically,  
18 Masimo has this additional allegation that the  
19 entire group of all 21 design inventors  
10:08AM 20 collectively committed inequitable conduct.  
21 Those allegations fail too because Masimo  
22 doesn't even allege that a single named  
23 inventor knew of any of the references that it  
24 cites that were supposedly withheld during  
10:09AM 25 prosecution, let alone that every single

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1 inventor knew of those references, knew of the  
2 specific disclosures within the references, and  
3 withheld them with an intent to deceive. The  
4 only allegation against the Design inventors  
10:09AM 5 specifically is that, on information and  
6 belief, they knew the claimed designs were  
7 functional and not ornamental as a result of  
8 the exposure to the development process.  
9 Basically, because they're inventors, they were  
10 exposed to the development; therefore, they  
11 must have known these patents were invalid for  
12 functionality.

13 THE COURT: Can I ask -- and I  
14 probably won't be able to articulate this very  
10:09AM 15 well, but maybe you'll catch my drift.

16 I understand that the Federal Circuit  
17 caselaw is very clear that you need to identify  
18 individuals that are substantively involved and  
19 you need to satisfy Rule 9(b). Arguably -- or  
10:10AM 20 maybe not arguably. It was clear it was doing  
21 that because it was trying to curb the amount  
22 of inequitable conduct claims that made it past  
23 the pleading stage.

24 But is there something inherently wrong  
10:10AM 25 with the idea of the inequitable conduct claim

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1 that they're trying to put forward, which is  
2 that if you've got a big company where there's  
3 somebody in charge, and we want to get both  
4 design patent claims and utility patent  
10:10AM 5 claims -- this is what they're saying. I get  
6 it you disagree -- on the same aspects of an  
7 invention and there's a person up there that  
8 says, okay, you guys are going to be the  
9 inventors on this one, and you guys are going  
10:10AM 10 to be the inventors on this one. The inventors  
11 might not really know anything about why  
12 they're listed on one or the other patent. Can  
13 that never be inequitable conduct, or is it  
14 just not inequitable conduct here for some  
10:11AM 15 reason?

16 MS. LIMBECK: It's not inequitable  
17 conduct here because as you mention, the  
18 Federal Circuit under the *Exergen* standard  
19 requires that you actually allege that there's  
10:11AM 20 some specific individual that knew -- that had  
21 a duty of disclose sure in these prosecutions  
22 and actually knew of some invalidating  
23 reference that was withheld.

24 THE COURT: Let me just ask. You say  
10:11AM 25 it's not here, but it looks to me like you're

1 also saying it could also be inequitable  
2 conduct if the person in charge doesn't have a  
3 duty of disclosure under the PTO rules.

4 MS. LIMBECK: Yes, Your Honor, I  
5 think that's true because when you just are  
6 pleading -- it basically amounts to a pleading  
7 against Apple as a company as a whole, which is  
8 exactly what the Federal Circuit has said  
9 cannot meet the pleading standard. If you're

10:11AM

10 just going to pick a name at the top of the  
11 legal department for Apple, that's basically  
12 the same thing as just accusing Apple in  
13 general without actually pleading any  
14 particular facts tying Mr. Meyers to these

10:12AM

15 particular prosecutions and even saying that  
16 he's the one that hired these different law  
17 firms. Apple has thousands of prosecutions  
18 every year. Of course they have multiple law  
19 firms. That's standard practice. That's not  
20 inequitable conduct.

10:12AM

21 Unless you have any other questions, Your  
22 Honor.

23 THE COURT: No, that's it. Thank you  
24 very much.

10:12AM

25 MS. LIMBECK: Thank you.

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1 MS. MILICI: Good morning, Your  
2 Honor. Jennifer Milici from WilmerHale.

3 Your Honor, as we explained in our brief,  
4 Masimo's antitrust claims fail at every turn.

10:12AM

5 Masimo's counterclaims are a mishmash of  
6 conflicting allegations that Apple stole the  
7 intellectual property of Masimo and others,  
8 sought confidential information from App Store  
9 Developers, and yet then flooded the market  
10 with somehow inferior products that somehow  
11 hurts the health watch market.

10:12AM

12 Taking the actual allegations as true for  
13 the purpose of the motion, these allegations  
14 cannot add up to an antitrust violation. We've  
15 listed three independent grounds on which the  
16 claim should be dismissed. I'm happy to start  
17 wherever you like or answer questions.

10:13AM

18 THE COURT: Well, agree with you that  
19 there's a kitchen sink. But that's not  
20 surprising, given that courts look very  
21 carefully at antitrust allegations, and you  
22 want to get in everything you can get and don't  
23 want it to be dismissed.

10:13AM

24 What about the Walker process? You  
25 agree it doesn't say the Walker process. Why

10:13AM

1 don't you focus on that.

2 MS. MILICI: Your Honor, we agree  
3 that it does not state a Walker process claim.  
4 As my co-counsel just explained, the  
5 inequitable conduct allegations fail. But even  
6 if you look at antitrust injury -- and just in  
7 general, Masimo has failed to allege an  
8 antitrust injury and certainly hasn't put  
9 forward any other theories. It doesn't even  
10 try.

10:13AM

10:13AM

11 But as to its Walker process allegations,  
12 its argument appears to be that if Apple were  
13 to succeed on a fraudulently obtained patent,  
14 then at that point they would be excluded.

10:14AM

15 This is an impossibility. If Apple were to  
16 succeed in excluding Masimo, it would be  
17 because it asserted a valid patent that's  
18 un infringed. There's no way the outcome of  
19 this litigation can be that Masimo is illegally  
20 included.

10:14AM

21 I want to factually distinguish this case  
22 from something like *TransWeb*. In *TransWeb*, you  
23 had a plaintiff who alleged that because it was  
24 unable to meet the costs of litigation, it had  
25 to sell part of its business at a fire sale

10:14AM

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1 price. It lost customers. You saw in that  
2 case that a jury awarded lost profits from an  
3 injury that happened because of the pendency of  
4 the litigation itself. The Court did talk  
5 about whether attorney's fees can be antitrust  
6 damages, but it did so in the context of the  
7 case where antitrust injury and liability had  
8 been established and were not contested. Those  
9 were not contested on appeal.

10:14AM

10 If we look at Masimo's allegations here,  
11 not only do they fail to allege that the cost  
12 of litigation is going to somehow impair their  
13 ability to compete, they allege the opposite.  
14 In paragraph 21 of their complaint, they  
15 affirmatively allege that they have the  
16 resources to litigate this case, so this is  
17 nothing like the situation in *TransWeb* where  
18 the litigation itself is going to cause harm.

10:15AM

10:15AM

19 THE COURT: Let me make sure I  
20 understand. Your view is -- let me ask it this  
21 way. You're seeking an injunction; right?

10:15AM

22 MS. MILICI: Yes Your Honor.

23 THE COURT: So if you won, they would  
24 be enjoined; right?

10:15AM

25 MS. MILICI: Yes, Your Honor.

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1 THE COURT: We're going to take this  
 2 real slow because it's still early for me and  
 3 the caffeine hasn't kicked in yet. So their  
 4 choice is either be enjoined from selling or  
 10:16AM 5 defend the litigation; right?  
 6 MS. MILICI: Your Honor, I understand  
 7 that that's how *TransWeb* set it up. I do want  
 8 to point out that they are not challenging all  
 9 of the patents that are being asserted by Apple  
 10:16AM 10 in this case, and that's just another  
 11 distinguishing feature.  
 12 THE COURT: Got it. Okay. I  
 13 understand.  
 14 MS. MILICI: So -- and, Your Honor, I  
 10:16AM 15 think that this came up in another case before  
 16 Your Honor, the *NRT* case. And again, we see  
 17 the distinguishing features there in a case  
 18 like *NRT* or *Bard* that they cite. You have a  
 19 plaintiff that was alleging that the litigation  
 10:16AM 20 itself caused harm to competition, not just if  
 21 the plaintiff had been successful in asserting  
 22 a fraudulently obtained patent.  
 23 I would also say that if you read  
 24 *TransWeb* in the way that Masimo suggests, I  
 10:17AM 25 think it runs directly into Third Circuit

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1 precedent. You see the Third Circuit in cases  
 2 like *Host International* which says that  
 3 speculative harms are not sufficient to state  
 4 an antitrust injury. It can't be a speculative  
 10:17AM 5 harm, can't be a potential harm. You have to  
 6 show facts that show actual injury.  
 7 And the injury Masimo is complaining of  
 8 is not just speculative. It's impossible.  
 9 There's no way that Apple can succeed on a  
 10:17AM 10 preliminary injunction if the patents were  
 11 actually fraudulently obtained because they are  
 12 able to raise that defense in this case.  
 13 THE COURT: I need to make a note.  
 14 Hold on one sec.  
 10:17AM 15 Okay. Go ahead.  
 16 MS. MILICI: Thank you, Your Honor.  
 17 And to be clear, as far as antitrust  
 18 injury goes, that's the only argument that they  
 19 make. They do not make any -- have any factual  
 10:18AM 20 allegations supporting an antitrust injury from  
 21 any of the other conduct that they allege.  
 22 They are not alleging that there's some portion  
 23 of the market that's been -- that they're  
 24 foreclosed from. It's not like a location  
 10:18AM 25 where they say they have access to some retail

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1 channel. They're really alleging injury to  
 2 itself as a business, which there's plenty of  
 3 caselaw that says that's not sufficient. Even  
 4 a plaintiff that's been harmed has to allege a  
 10:18AM 5 wider impact of the allegation, and the other  
 6 claims in the complaint other are conclusory.  
 7 THE COURT: Understood.  
 8 MS. MILICI: I'm happy to talk about  
 9 the anticompetitive conduct on this.  
 10:18AM 10 THE COURT: Why don't you hit those.  
 11 We talked about the Walker process where the  
 12 conduct is sued.  
 13 MS. MILICI: We talked about the  
 14 Walker process. In addition, Masimo alleges  
 10:18AM 15 that Apple infringes intellectual property. We  
 16 cited caselaw from across the country showing  
 17 that infringement of intellectual property  
 18 cannot be a basis for an antitrust claim. If  
 19 you look at cases like *Philadelphia Taxi* which  
 10:19AM 20 wasn't dealing with intellectual property, but  
 21 it really states the proposition clearly that  
 22 conduct that brings more competitors to market  
 23 can't be exclusionary conduct. In that case,  
 24 it was even people who entered the market  
 10:19AM 25 illegally through illegal conduct. That's

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1 still pro competitive. It brings competitors  
 2 to the market. It can't be a basis for the  
 3 antitrust claim.  
 4 Moving on to the allegations, Masimo  
 10:19AM 5 alleges that there's a monopoly leveraging. As  
 6 Your Honor stated in *Simon and Simon*, monopoly  
 7 leveraging is not a standalone claim. You need  
 8 to allege unlawful conduct, and Masimo hasn't  
 9 done that. In its opposition brief, it  
 10:19AM 10 references seeking confidential information as  
 11 if that's an unlawful act. Of course, Apple,  
 12 like everybody else, has the right to choose  
 13 who they will deal with and on what terms, and  
 14 Masimo points to no caselaw saying that  
 10:20AM 15 somebody is unable to ask for information.  
 16 I think if you look really closely at the  
 17 actual paragraphs in the complaint on this,  
 18 they don't ever allege that they gave any  
 19 confidential information to Apple or that Apple  
 10:20AM 20 did anything with that confidential  
 21 information. It's just this kind of  
 22 theoretical proposition that they could have  
 23 given information to Apple or somebody else  
 24 might have and Apple might have misused that,  
 10:20AM 25 but that's not in his complaint.

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1 In addition, either, the harm they're  
2 conclusorily asserting from that is that  
3 somehow it might stop somebody from wanting to  
4 invest or innovate, but they don't allege  
10:20AM 5 anything Apple did caused them to stop  
6 investing. In fact, they alleged exactly the  
7 opposite, that they're investing like  
8 gangbusters and ready to go. So they pled  
9 themselves out of court on each of these  
10:21AM 10 issues.  
11 Finally, on false advertising, courts  
12 apply a very high standard to antitrust claims  
13 based on false advertising. Otherwise, the  
14 courts would be chock full of people  
10:21AM 15 complaining that its competitors -- that they  
16 don't like their competitors' ads and they're  
17 entitled to treble damages. And they don't  
18 come close to meeting the standard for an  
19 antitrust claim based on false advertising.  
10:21AM 20 Again, for the same reasons. They are not  
21 alleging they were foreclosed from the market  
22 as a result of it. They're not alleging  
23 they're unable to compete. They're not  
24 alleging they're unable to contradict those  
10:21AM 25 statements. If anything, the allegations shows

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1 they're plenty able to fund studies that they  
2 claim disprove Apple's advertising and put it  
3 out in the world. For both antitrust injury  
4 and antitrust conduct, these are separate bases  
5 on which the claims should be assessed.  
6 I'm happy to move on to the market  
7 definition or move on to false advertising  
8 and --  
9 THE COURT: Why don't you move on to  
10:21AM 10 false advertising.  
11 MS. MILICI: Thank you, Your Honor.  
12 So for the false advertising claim,  
13 there's, again, like, a fundamental mismatch  
14 between what they're saying Apple said is false  
10:22AM 15 and why they say it's false. So there's a  
16 mismatch between the facts that they say the  
17 statements are false and the statements  
18 themselves, and I can talk about that in a  
19 second.  
10:22AM 20 In addition, they have again failed to  
21 allege any proximate cause between what's the  
22 injury to Masimo from these ads and what are  
23 the steps in between. Just to illustrate that  
24 point, if you look at their allegations about  
10:22AM 25 what it is Apple said and you look at it on the

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1 blood oxygen feature, they have three  
2 paragraphs in their counterclaims that describe  
3 a 2020 launch, and there's a video of that  
4 launch. That video is available on YouTube.  
10:22AM 5 They also allege that there have been articles  
6 that came out since then that they say the  
7 blood oxygen feature doesn't work unless you  
8 use it right. That's what those articles say.  
9 Even if you were to take the articles to  
10:23AM 10 mean what Masimo says they do, their product  
11 didn't come out until the end of 2022. I think  
12 their theory is that people who were looking  
13 for the blood oxygen monitors at the end of  
14 2022 are going to go to YouTube, pull up the  
10:23AM 15 video, watch the first 15 minutes of it in  
16 which there's general discussion about blood  
17 oxygen monitoring, and no statements made --  
18 but then they're going to take a misimpression  
19 from that about Apple and then not read  
10:23AM 20 anything else and then not buy the W1 instead.  
21 And I think they have not alleged those  
22 chains, the steps of the chain of causation,  
23 which as we see in the case, like *Lexmark*, but  
24 also *Mispresto*, you need to allege in order to  
10:23AM 25 plead a false advertising claim. Just saying

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1 they said this thing years ago and I lost  
2 sales, it's not enough. There has to be some  
3 plausible allegation of the steps in the  
4 causation there.  
10:24AM 5 When we look at the particular  
6 statements, I just rewatched that video this  
7 morning. It does not say what Masimo claims  
8 its study proves is false. It's statements  
9 about the Apple watch generally, statements  
10:24AM 10 about what blood oxygen is, what blood oxygen  
11 measurements are used for, and statements that  
12 you can measure your blood oxygen with the  
13 Apple watch. There's no statement in that  
14 video or any of the other ads that they are  
10:24AM 15 citing that says that this is -- that this is  
16 the same. It's suitable to replace a  
17 hospital-grade monitor. That's just not in  
18 these statements.  
19 And I think when you look at that, it's  
10:24AM 20 clear that there's just a mismatch between what  
21 they're doing -- and I'm going to leave aside,  
22 of course, we have very serious criticisms of  
23 the study that Masimo did -- and -- but we'll  
24 stay in the four corners of the complaint for  
10:25AM 25 this argument.



1 I would say the same thing on the IRN  
2 features where, again, the statements that  
3 they're referring to in their counterclaims say  
4 that the Apple Watch will check for irregular  
10:25AM 5 rhythms and irregular rhythms may be suggestive  
6 of A-fib. That's the statement.

7 And then they cite to a Mayo Clinic study  
8 that said not everybody who mentioned the Apple  
9 Watch when they presented to the ER had a  
10:25AM 10 clinically actionable diagnosis when they leave  
11 there. I think when you read the study,  
12 limitations of the study, that suggests it  
13 can't be read the way Masimo wants to. Even if  
14 you were to accept their representation of it,  
10:25AM 15 there's no statement where Apple ever said if  
16 you get this notice, it means that when you get  
17 to the ER that you will at that point have a  
18 diagnosis that's going to be caught. Again,  
19 it's a mismatch between what they say are false  
10:26AM 20 statements and the facts that they say prove  
21 that they are false.

22 So, Your Honor, I'm happy to answer any  
23 questions on any of these things.

24 THE COURT: No, that was very  
10:26AM 25 helpful. Thank you very much. I appreciate

22

1 it.  
2 MS. MILICI: Thank you.  
3 THE COURT: Let's hear from the other  
4 side. We gave Apple a little extra time.  
10:26AM 5 You're welcome to have the extra time as well  
6 if you need it.

7 MR. POWELL: Thank you. My name is  
8 Adam Powell for counter-claimant Masimo, and  
9 I'll start with the inequitable conduct claims.

10:26AM 10 And I want to start where counsel  
11 started, which is this idea of who conducted or  
12 who was responsible for the inequitable  
13 conduct. There's a lot of discussion of a  
14 mishmash, where we have supposedly some  
10:26AM 15 allegations that are unclear as to whether  
16 they're directed at Mr. Meyers or the named  
17 inventors or Apple as a whole, and I think  
18 that's wrong.

19 If you look as to each individual person,  
10:27AM 20 I'll give you some examples, is that Mr. Meyers  
21 is one of the individuals responsible for,  
22 again, like you said, selecting which firm is  
23 responsible for each aspect. And Masimo has  
24 alleged that Mr. Meyers withheld information  
10:27AM 25 and concealed information, took affirmative

1 steps to prevent the disclosure of material  
2 information to the Patent Office.

3 Now, we have separately alleged that  
4 Apple did not disclose the information to the  
10:27AM 5 Patent Office. Those allegations about Apple  
6 as a whole are really important for the --  
7 but -- for materiality because if Mr. Meyers  
8 concealed the information but someone else  
9 disclosed it, Apple may say it's not material.  
10:27AM 10 That's why we say nobody disclosed it from  
11 Apple and then we say Mr. Meyers specifically  
12 concealed it and he intended to deceive the  
13 Patent Office.

14 The same is true for the named design  
10:28AM 15 inventors. The allegation isn't directed to  
16 them collectively. We used a defined term to  
17 save space. It could have been separate  
18 paragraphs for each individual person. The  
19 idea also isn't that these named design  
10:28AM 20 inventors, just by virtue of the fact they  
21 developed the material, they must know it's  
22 functional. That's not the allegation. The  
23 allegation is they worked with the engineers  
24 who do know the functional aspect of the  
10:28AM 25 design. They were aware of the functional

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1 aspect because of the way they worked with the  
2 engineers that developed the functional aspect.  
3 Again, that --

4 I just don't think there's any mishmash.  
10:28AM 5 The complaint is very specific and deliberate  
6 as to who did each thing, and if you look at  
7 Meyers alone, we pleaded everything we need to  
8 plead, that he had knowledge of this functional  
9 aspect, that he had knowledge of the withheld  
10:29AM 10 art, and that he deliberately concealed that  
11 information from the Patent Office.

12 Now, Apple also argues that this is a  
13 novel theory, that the idea of selecting two  
14 different law firms, one law firm to prosecute  
10:29AM 15 design patents, a different one to prosecute  
16 utility patents, a third one to assert some of  
17 those same patents against Masimo in IPRs  
18 they're saying is a novel theory, and nothing  
19 supports that. They've not cited any caselaw  
10:29AM 20 dismissing the allegation from a complaint.

21 And I think that's what's important here,  
22 is that the Patent Office is specific that you  
23 don't have to allege someone actually signed a  
24 paper and submitted it to the Patent Office.  
10:29AM 25 The allegation is that the person has to be

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1 substantively involved in the prosecution, and  
2 one way you can be substantively involved is  
3 deliberately picking who to prosecute the  
4 patents so that you can keep information away  
10:30AM 5 from the Patent Office.

6 And as Your Honor pointed out, it's sort  
7 of fundamentally unfair to say, well, he  
8 deliberately chose different people to  
9 prosecute these applications, and he did so for  
10:30AM 10 the specific purpose of withholding it from the  
11 Patent Office so that Apple could obtain  
12 patents that he knew were invalid and then to  
13 say he didn't actually sign the paper itself so  
14 therefore you're off the hook. There's no  
10:30AM 15 caselaw that supports that. It's not supported  
16 by the regulations that state who has a duty to  
17 disclose. And the allegation that, hey, this  
18 is commonplace and Apple does it all the time,  
19 look, that may or may not be true. That is a  
10:30AM 20 factual dispute, though. It can't be resolved  
21 in the pleadings.

22 Our allegations are very specific. They  
23 must be accepted as true and all inferences  
24 have to be in our favor at this stage, and we  
10:31AM 25 can see what discovery will yield and whether

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1 we can ultimately prove our claims of  
2 Mr. Meyers' intent.  
3 So I also wanted to talk about this idea  
4 that Mr. Meyers, they said, is false. His name  
10:31AM 5 never appears in the prosecution history. This  
6 was in our opposition. His name is on the  
7 customer list; right? That's the issue is,  
8 there's a -- I'm sorry. Not customer list. A  
9 customer number; right? That's the customer  
10:31AM 10 number of everybody that has power of attorney  
11 in that particular application, and we dealt  
12 with that in our opposition.

13 And Apple responded with this case in  
14 their reply, *Digital Ally*, and they said that  
10:31AM 15 *Digital Ally* held a customer number in no way  
16 indicates any role or responsibility in  
17 prosecution. That's incorrect.

18 If you look at this *Digital Ally* case,  
19 there's a couple problems with it. Number one,  
10:31AM 20 it was not addressing inequitable conduct or  
21 the standards at the pleading stage. What it  
22 was addressing is whether a prosecution bar  
23 should apply far and wide. And Apple didn't  
24 quote the holding of the case. They quoted a  
10:32AM 25 declaration from the plaintiff in that case

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1 that stated that "this customer number listing  
2 for a Reese includes all practitioners in the  
3 firm who are licensed to practice before the  
4 USPTO but in no way indicates any role or  
10:32AM 5 responsibility for prosecution on behalf of  
6 that client." It was a specific factual  
7 allegation made by one of the parties in that  
8 case. It was not Court holding that a customer  
9 number in no way indicates role in prosecution.

10:32AM 10 I'll move on briefly to the false  
11 advertising. My colleague will be addressing  
12 the antitrust allegations include those  
13 allegations that they relate to false  
14 advertising, but on the merits of the false  
10:32AM 15 advertising claim, we also have this argument  
16 that there's a mismatch between the facts and  
17 the proximate cause and what actually happened  
18 here and what the allegation -- or what the  
19 video says.

10:33AM 20 Counsel indicated that they reviewed the  
21 video and it doesn't actually support an  
22 argument that Apple is advertising blood oxygen  
23 as clinically acceptable. The issue there is  
24 our complaint is very specific that -- and I'll  
10:33AM 25 quote it. This is paragraph 143 states that

28

1 "Apple falsely and continually associates the  
2 Apple Watch's pulse oximetry feature with  
3 medical use and reliable measurements." We  
4 then go on to have six paragraphs explaining  
10:33AM 5 and quoting from all of the different  
6 advertisements. It's --

7 The argument is, well, we never actually  
8 said it's clinically acceptable. No, what you  
9 did is you had a whole bunch of advertisements  
10:34AM 10 that created that impression to the consumer,  
11 and that's a false and misleading impression  
12 because even Apple is not arguing that its  
13 blood oxygen is actually accurate. The reality  
14 is the studies and various different  
10:34AM 15 third-party --

16 (Loud noise in the courtroom.)  
17 THE COURT: Is everyone all right?  
18 MR. PHILLIPS: Knocking them over.  
19 MR. POWELL: What's in the complaint  
20 is we have studies referenced, we have  
21 statements from third parties all indicating  
22 that the blood oxygen feature is not reliable.  
23 And in fact, some of those third parties came  
24 out and said, look, Apple is misleading  
10:34AM 25 consumers. We have that in our complaint where



1 the third parties say Apple is convincing  
 2 customers to use this in a way that's  
 3 inappropriate, and they have this sort of  
 4 fine-print disclaimer and they think that  
 10:34AM 5 immunizes them. But the reality is people are  
 6 going to use this thing for medical purposes  
 7 when they have no justification for doing so.  
 8 Again, this is all pleaded in the  
 9 complaint beginning at paragraph 143. The  
 10:35AM 10 allegations are very specific. And really all  
 11 I'm hearing from counsel is disagreeing about  
 12 the facts, and those facts, again, that's a  
 13 question for another day. At this point, they  
 14 need to be accepted as true.  
 10:35AM 15 And just very briefly on IRN, the  
 16 irregular rhythm notification. This is the  
 17 same argument, is that, well, customer, Apple  
 18 says it may be indicative of a problem. The  
 19 reality is 90 percent of people that went to  
 10:35AM 20 the hospital didn't have any new actionable  
 21 issue. Now, Apple says it's actually  
 22 60 percent of them because some of them had an  
 23 existing problem; right? Well, you've still  
 24 got 40 percent false positive. About half of  
 10:35AM 25 the people that appear in the hospital don't

1 need help, and that's the problem, is Apple is  
 2 advertising the Apple watch as getting you help  
 3 when you need it. That's the quote. "When you  
 4 need it." About half of the people at least,  
 10:36AM 5 even reading the article the way Apple wants to  
 6 read it, which would be improper at this stage,  
 7 about half of the people don't need help.  
 8 So the reality is, again, we have very  
 9 specific allegations. This is a factual  
 10:36AM 10 dispute on the false advertising material. The  
 11 allegations need to be accepted and taken all  
 12 inferences in our favor at this point.  
 13 So the only thing I'll add is, of course,  
 14 if there's some reason, some deficiency, of  
 10:36AM 15 course, there's more allegations that could be  
 16 added if we needed to amend, and I don't think  
 17 Apple is seriously asking for dismissal with  
 18 prejudice. It was mentioned one time in a  
 19 conclusion, so there's really no support or  
 10:36AM 20 argument for that.  
 21 With that, unless you have any further  
 22 questions.  
 23 THE COURT: No, thank you.  
 24 MR. POWELL: Thank you.  
 10:36AM 25 MR. LARSON: Good morning, Your Honor

1 Steven Larson for counter-claimant Masimo  
 2 before the Court. I'll address the antitrust  
 3 issues. I didn't hear argument about the  
 4 market power and definitions. I'll skip those  
 10:37AM 5 unless the Court has any questions.  
 6 THE COURT: No questions.  
 7 MR. LARSON: I'll start where counsel  
 8 started with Walker process, and counsel argued  
 9 that our theory runs squarely into the Third  
 10:37AM 10 Circuit precedent. The *TransWeb* is the Federal  
 11 Circuit's leading Walker process case. It was  
 12 an appeal from the District of Delaware  
 13 applying Third Circuit precedent. We also  
 14 cited the *Garden* case which a District of  
 10:37AM 15 Delaware case that denied summary judgment of  
 16 Walker process claims where the only allegation  
 17 of injury was attorney's fees and also there  
 18 was lost opportunities that were investment  
 19 opportunities that were alleged. That was all.  
 10:37AM 20 In this case, we allege, certainly,  
 21 attorney's fees. We also allege lost  
 22 opportunities, lost investments or lost  
 23 business opportunities, harm to our business  
 24 reputation. And we explain, similar to what  
 10:38AM 25 *TransWeb* calls for, why Apple's conduct,

1 Apple's assertion of fraudulent patents, if  
 2 successful, would harm competition. You saw in  
 3 *TransWeb* a really beautiful explanation on why  
 4 you focus on the harm to competition that would  
 10:38AM 5 result in the scheme is successful. The  
 6 Federal Circuit explained the focus is on the  
 7 competition reducing act is filing a lawsuit  
 8 asserting fraudulent acts.  
 9 In its reply, Apple pointed to the *Otsuka*  
 10:38AM 10 case to argue what the Federal Circuit said  
 11 attorney's fees are not antitrust injuries,  
 12 that was really not what it meant. It was  
 13 really just talking about damages, not  
 14 antitrust injury, and the *Otsuka* case is a  
 10:38AM 15 decision from the District of New Jersey. But  
 16 this Court, in *Azurity*-- that's 2023 Westlaw  
 17 157732 -- rejected that interpretation from the  
 18 *Otsuka* case and said no, the *TransWeb* case  
 19 means what it says. Attorney's fees spent in  
 10:39AM 20 response to a lawsuit asserting fraudulent  
 21 patents are antitrust injury.  
 22 THE COURT: What's the case you just  
 23 mentioned?  
 24 MR. LARSON: *Azurity*. It's 2023  
 10:39AM 25 Westlaw 15732. So that's three Delaware cases

1 supporting our view of *TransWeb* and how it  
2 should apply here.  
3 Our allegations are very similar. We  
4 explain in our complaint that what Apple is  
10:39AM 5 trying to do here, again, they're pretty open  
6 about it. They filed this lawsuit, and they  
7 sought expedited discovery because they might  
8 seek a preliminary injunction. They sought to  
9 expedite the schedule because of potential harm  
10:39AM 10 they think will result to the market shares and  
11 our product competing. They alleged in the  
12 complaint that -- eventually what they argued  
13 is our product is so powerful that it could  
14 reach potentially 100 percent of the market.  
10:39AM 15 And this is exactly what a Walker process  
16 case is about, a party that asserts fraudulent  
17 patents to stop competitors who actually have  
18 the possibility of opening up competition,  
19 displacing their market position, displacing  
10:40AM 20 their monopoly power. So I think we clearly  
21 have an antitrust injury for the Walker  
22 process. That's straightforward. If we manage  
23 this injury of Walker process, we have standing  
24 for all the theories.  
10:40AM 25 Apple said we don't explain our antitrust

34

1 injuries for the other theories. That's not  
2 true. In our brief, we pointed to paragraphs  
3 where we explained why those other theories  
4 aren't competition. There wasn't much argument  
10:40AM 5 about that in the brief, but I can go into more  
6 detail on those.  
7 If you have antitrust injury on on  
8 theory, at that point you need to look at the  
9 overall anti-competitive scheme, which we do.  
10:40AM 10 And Apple argues you can't add lawful conduct  
11 and lawful conduct to come up with an  
12 anticompetitive scheme, but clearly asserting a  
13 fraudulent patent is anti-competitive, and if  
14 that is accepted, then you look at the overall  
10:40AM 15 scheme.  
16 I'll move on now to predatory  
17 infringement and, essentially, the arguments in  
18 the briefs was essentially there should be a  
19 bright-line rule that patent infringement can  
10:41AM 20 never be anticompetitive, and we show there is  
21 no bright-line rule like that for the Federal  
22 Circuit, and that makes a lot of the sense.  
23 And we cited the *Styles* case that said, well,  
24 it was part of an overall scheme of conduct in  
10:41AM 25 that case. The Court allows the allegations to

1 go forward, including allegations of  
2 intellectual property theft, and that was in  
3 California.  
4 And we think it really makes sense here,  
10:41AM 5 and we explain in great detail in our complaint  
6 that Apple has a practice. Apple calls it  
7 efficient infringement. We would call it  
8 predatory infringement, which is Apple  
9 identifies a market, identifies a technology  
10:41AM 10 leader, purports to meet with the technology  
11 leader, but ends up taking their technology and  
12 eventually displaces the technology leader and  
13 does so through, first of all, imperfect theft.  
14 In other words, instead of lawfully working  
10:41AM 15 with the technology leader, takes the  
16 technology in a way that implements it  
17 imperfectly, which spoils the market, which  
18 harms the market. If Masimo is coming out with  
19 its watch now without Apple already being out  
10:42AM 20 there with a pulse oximetry feature that  
21 doesn't work well, I think the market would be  
22 in a much better position to receive our  
23 product. And instead what you see is a  
24 combination of conduct of Apple pulling out all  
10:42AM 25 the stops, essentially, to try to stop us in

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1 our tracks, stop the new product that Apple  
2 recognizes is so powerful that it might  
3 substantially erode Apple's market share.  
4 It does that through, first of all,  
10:42AM 5 taking our technology and imperfectly  
6 implementing it which spoils the market,  
7 engaging in false advertisement which hides the  
8 fact of the flaws in its own technology, which  
9 is even worse because once consumers experience  
10:42AM 10 that -- they expect Apple -- if anybody is  
11 going to have a product that works well, it's  
12 going to be Apple. They see pulse oximetry  
13 doesn't work well, and that harms the market,  
14 hurts us.  
10:42AM 15 Also, as we're about to launch our  
16 product, Apple exploits its power over IOS apps  
17 to prevent our competing health app from being  
18 able to be approved and does it through  
19 affirmative conduct, not just failure to deal,  
10:43AM 20 lack of deal, does it through, essentially,  
21 trying to acquire confidential information  
22 under false pretenses, is our allegation. And  
23 in that case, we cited the *Ally* court case  
24 where the court denied a motion to dismiss  
10:43AM 25 where the allegation was Apple was using its

1 power over IOS apps to harm the competing app,  
2 to prevent that competing app --

10:43AM

3 In our case, not only do they harm our  
4 competing app, but they harmed our actual  
5 competing product in the nascent health watch  
6 market just as it was being where released,  
7 basically making it a worse product. It is not  
8 something that's just happened to Masimo. It  
9 happened to many companies. It happened to

10:43AM

10 Alive Core. This harm to composition is not  
11 just harm to us, and I think if you look at the  
12 overall scheme, it would make sense that we  
13 would allege all these allegations as Apple  
14 pulling all the stops out to try to stop us in  
15 our tracks to try to stop us from releasing  
16 our product.

10:44AM

17 Going to monopoly leveraging, as we said,  
18 we allege affirmative misconduct. It's not  
19 simply a lack of a duty to deal. We point out  
20 that Apple uses the developer agreement,  
21 section 9.23, where Apple says we can use  
22 whatever confidential information you give us  
23 for any purpose and uses its power over IOS  
24 apps to try to obtain confidential information  
25 through that process. And again, it's not just

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1 harm to Masimo. Apple has done this to other  
2 companies, including Alive Core.

10:44AM

3 False advertising, as I mentioned, this  
4 is part of the overall scheme where Apple tries  
5 to hide the fraud in the imperfectly acquired  
6 technology. Apple again -- the pattern here is  
7 you don't really see them squarely addressing  
8 our allegations, at least in the briefing. To  
9 show whether or not plausible, Apple argues  
10 bright-line rules. They say you have to show  
11 that it's clearly false, but we cited caselaw  
12 including the pages -- including the pages that  
13 explains it doesn't have to be clearly false.  
14 It could be false or misleading. It doesn't  
15 have to be knowing.

10:44AM

10:45AM

16 And Apple also argues, well, you have to  
17 show that you couldn't correct the false  
18 advertising, but Apple cites cases where for,  
19 example, the defendant sends a mailer to  
20 hospitals that had some statements that were  
21 arguably not true, and the Court said, well,  
22 the plaintiff could easily send the same mailer  
23 and correct those statements. In our case, you  
24 have Apple, largest company in the world,  
25 basically a household name. I read a report

10:45AM

10:45AM

1 that it spent probably \$12 billion in  
2 advertising in 2020, which is probably more  
3 than Masimo's revenue, and the idea that  
4 Masimo, which is still relatively unknown in  
5 the consumer market, is going to put out an  
6 advertising campaign that undoes the harm in  
7 the public when it perceives Apple as a company  
8 that's always going to have the best products,  
9 the harm from that false advertising just  
10 doesn't make a lot of sense.

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11 In fact, in our complaint, we point out  
12 there's an article in the *Washington Post* and  
13 *Verge* that point out the flaws in Apple's  
14 technology but that hasn't corrected the  
15 problem.

16 We think to the extent the allegations  
17 are required on that, we can provide it, but we  
18 think what we have a sufficient, and the pages  
19 confirm false advertising. Our allegations are  
20 plausible, and I think they should go forward.

21 I just make a brief note on fair  
22 competition, which is that we point out that  
23 even if the conduct that's pointed to doesn't  
24 rise to the level of violating the Sherman Act,  
25 it would still be an incipient violation under

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1 California's unfair competition law, and we  
2 pointed to the *Epic* case from the Northern  
3 District of California. I want to point out  
4 since then the Ninth Circuit affirmed that case  
5 and affirmed that under California law, even if  
6 conduct doesn't quite rise to the level of  
7 violating the Sherman Act, there can still be  
8 an incipient violation. And of course, we  
9 think we more than satisfy showing that Apple  
10 violated the Sherman Act.

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10:47AM

11 If you think about it, incipient  
12 violation, when you have a company like Masimo  
13 on the cusp of providing that product, this  
14 amazing product that would actually displace  
15 Apple's dominant position, open up the market,  
16 bring competition, reduce prices, provide more  
17 choices, and Apple engages in all this conduct  
18 to stop us in our tracks, we certainly think  
19 that shows at least an incipient violation.

20 Unless Your Honor has questions, I think  
21 that's all.

22 THE COURT: Very good. Thank you  
23 very much. We'll just give you a couple  
24 minutes to make a reply.

25 MS. MILICI: Thank you. I appreciate

<p>1 the opportunity. There are a couple things 2 that counsel said that I really want to respond 3 to. 4 One is this idea that if they make it a 5 Walker process claim that means that they have 6 standing to seek broad discovery into anything 7 Apple has ever done. That is not what the 8 caselaw says. The caselaw is clear that they 9 have to state -- they have to plausibly allege 10 claims in order to have standing to bring those 11 claims. 12 THE COURT: Let me just ask that 13 because this is always tricky for us. So they 14 have a count that says attempted 15 monopolization, and they alleged a lot of 16 conduct in there. And I heard them say -- I'm 17 thinking out loud here, just so you know -- I 18 heard them say as long as we allege one type of 19 anticompetitive conduct, we could move forward 20 with the claim. You would agree if that was 21 right, they could move forward with the claim. 22 You're just saying they can't move forward with 23 discovery about other types of anticompetitive 24 conduct and conduct that independently states 25 the antitrust claim?</p>	<p>43 1 claims about unilateral refusals to deal would 2 be -- would have to go to discovery and would 3 be the subject of litigation and <i>Trinko</i> and 4 other case law explains why that shouldn't be. 5 This is unilateral conduct we're talking about, 6 and as you recognize in <i>Simon</i> and other cases, 7 there's a chilling effect if we allow claims 8 that don't have a plausible antitrust theory to 9 go forward because they happen to be thrown it. 10 And it encourages plaintiffs to throw in 11 everything they think of no matter how 12 plausible so that they can impose incredible 13 discovery allegations on the defendant. 14 THE COURT: Understood. And again, 15 I'm thinking out loud here. I think what's 16 challenging for the Court in this particular 17 case given these particular parties and their 18 history of litigation against each other, 19 arguments about burdens of discovery are maybe 20 taken with a degree of skepticism, and I 21 don't -- but I get it. I get what you're 22 saying. 23 MS. MILICI: If I could just respond 24 to that point because I think we've been 25 engaging in discovery. They served discovery</p>
<p>42 1 MS. MILICI: I think there's 2 authority dealing with this both ways. From 3 the District of Delaware, there's the <i>Thompson</i> 4 <i>Reuters</i> case where the court -- there was one 5 Section 2 claim with two different forms of 6 conduct and the the court dismissed the Section 7 2 claim based on one kind of conduct. And it's 8 clear when you read the counterclaims, they're 9 saying each of these are independent claims. I 10 as well as collective claims, so I think they 11 should be viewed individually. 12 There's a decision from Judge Boseberg in 13 DC in the Section 2 claim where he said this 14 theory is not viable because it's part of a 15 single claim. I'm not going to dismiss the 16 claim, but you're not going to get discovery on 17 the non-viable theory because that would be an 18 absurd result. That would mean every time 19 somebody has one theory and they have one 20 exclusionary contract theory that means that 21 they can just say anything and get discovery on 22 it, and that's just not the law. And I would 23 point the Court to cases like <i>New York v.</i> 24 <i>Facebook</i> which really lays out why this is and 25 explains that, basically, otherwise nonviable</p>	<p>44 1 requests. Some of the requests are asking for 2 things like, basically, every app store review 3 that Apple has ever done based on the thinnest 4 of allegations. That hasn't been the subject 5 of discovery in any litigation between the 6 parties. That's brand new litigation, brand 7 new discovery and not suggested by any of the 8 allegations in the complaint. 9 I will also say that counsel got up here 10 and talked about this supposed theory they 11 steal trade secrets. That's being litigated in 12 the Central District of California. That 13 cannot be relitigated here. The Central 14 District of California case, when it has a 15 decision, it will be res adjudicata. It's not 16 an antitrust injury anyway, but certainly they 17 don't get a second bite of the apple. Judgment 18 as a matter of law was granted against them in 19 some of the claims by Judge Tilghman, and 20 jurors voted six to one among them on the 21 others until a mistrial was declared. Those 22 issues are going to be decided there. They're 23 not antitrust issues to begin with, but they 24 certainly don't get to come here and repackage 25 then them as antitrust violations and get a</p>

1 different result than they got the first time.  
 2 THE COURT: I understand.  
 3 MS. MILICI: Just to make a couple  
 4 arguments on that. I was surprised to hear  
 10:52AM 5 Apple stand here and talk about how Apple  
 6 prevented them from releasing an app. Those  
 7 apps are available. It's not true that Apple  
 8 prevented them from releasing them. It's not  
 9 true that they gave Apple any confidential  
 10 information. So they'll ask for allegations  
 11 that when you look at what they wrote down,  
 12 don't make any sense, and they have not  
 13 provided -- they have not identified any  
 14 unlawful conduct.  
 10:53AM 15 THE COURT: Maybe one way to address  
 16 that concern that you have -- and I'm not  
 17 making any rulings today, so don't feel like  
 18 you need to jump up. But that I say, okay, to  
 19 the extent there are some disputes about  
 10:53AM 20 discovery where they want every App Store  
 21 review -- I'm going to handle discovery for  
 22 this case -- you come back to me, and I say,  
 23 look, that's not going to happen or I say,  
 24 look, you've already got a bunch of discovery.  
 10:53AM 25 If you think that the trade secret

1 misappropriation stuff is relevant, maybe it  
 2 is, and maybe it isn't, but you've already got  
 3 the discovery. Do you understand what I'm  
 4 saying? Could we deal with some of that that  
 10:53AM 5 way?  
 6 MS. MILICI: Your Honor, they haven't  
 7 satisfied *Twombly* on the App Store allegations,  
 8 and the entire point of *Twombly* is that you  
 9 shouldn't go forward with antitrust discovery  
 10:53AM 10 unless you can meet the pleading requirements,  
 11 and for these App Store allegations, as Your  
 12 Honor said in *Simon and Simon*, companies have  
 13 the ability to choose who they will deal with  
 14 and on what terms, and they have not alleged  
 10:54AM 15 anything, any unlawful conduct -- first of all,  
 16 they did claim that as to the scheme -- on page  
 17 nine of their brief, they say they're not  
 18 bringing that claim, and they have not  
 19 identified any unlawful conduct. They don't  
 10:54AM 20 cite a single case saying that a company can't  
 21 ask for information from people who it deals  
 22 with. I think they have to meet the pleading  
 23 requirements of this claim before they can seek  
 24 discovery. I think that's a fundamental  
 10:54AM 25 principle.

1 THE COURT: Okay. I understand your  
 2 point. Thank you.  
 3 MS. MILICI: And just -- I didn't  
 4 hear them anywhere say anything about proximate  
 10:54AM 5 cause for -- on these advertisements. Like, at  
 6 the end of the day, there is no link between  
 7 the advertisements that they say are false and  
 8 any harm to them, and that's the point that we  
 9 were making, Your Honor.  
 10:54AM 10 THE COURT: All right. Thank you.  
 11 MS. LIMBECK: Your Honor, if I could  
 12 address a couple of the points they made on  
 13 inequitable conduct.  
 14 They made this argument that Mr. Meyers  
 10:55AM 15 was substantively involved in the prosecution  
 16 of the applications because he was listed among  
 17 50 or 100 attorneys under Apple's customer  
 18 number for those applications. But first of  
 19 all, that is not anywhere in their pleading.  
 10:55AM 20 They did not actually allege that he's listed  
 21 on the customer number or has power of  
 22 attorney.  
 23 Second of all, even if they had alleged  
 24 that, that is not enough to show substantive  
 10:55AM 25 involvement. This district -- we cited a case

1 from Judge Andrews where he dismissed  
 2 inequitable conduct allegations for two  
 3 attorneys for failure to disclose, failure to  
 4 show duty of disclosure because they were just  
 10:55AM 5 listed as power of attorney with five other  
 6 attorneys and they weren't substantively  
 7 involved in the prosecution.  
 8 And the Federal Circuit told us what  
 9 "substantive involvement" means. It means  
 10:56AM 10 involvement with the content of the  
 11 applications, and they have not alleged that  
 12 Mr. Meyers had any involvement with these  
 13 particular applications at all.  
 14 And the other thing they say is, well,  
 10:56AM 15 Mr. Meyers and others at Apple generally hire  
 16 multiple law firms. Again, that does not show  
 17 that Mr. Meyers himself specifically was  
 18 substantively involved in any of the  
 19 applications. It shows the opposite. Outside  
 10:56AM 20 counsel prosecuted these applications, not  
 21 Mr. Meyers, the chief of IP at Apple.  
 22 And then with respect to their other  
 23 points, they keep saying we've made these  
 24 allegations and you should take them as true.  
 10:56AM 25 But that does not meet the heightened pleading



1 standard for inequitable conduct. They  
2 actually need to plead particular facts that  
3 identify a specific individual and particular  
4 facts from which you can reasonably infer that  
10:57AM 5 that particular individual had knowledge of  
6 specific references that were withheld, and  
7 they have not done that here for Mr. Meyers,  
8 and they haven't done it for all 21 of the  
9 design inventors.  
10:57AM 10 In fact, they admit the only allegation  
11 they have against the design inventors is that  
12 they were involved in development. If that  
13 were enough for inequitable conduct, every  
14 single defendant that pleads invalidity could  
10:57AM 15 also plead on information and belief the  
16 inventors must have known the patent was  
17 invalid for this reason or that reason;  
18 therefore, we have an inequitable conduct claim  
19 against the inventors. That would eviscerate  
10:57AM 20 the heightened pleading standard, and Your  
21 Honor should not allow that sort of an argument  
22 here.  
23 So they can move forward with their  
24 invalidity arguments. We disagree with them,  
10:58AM 25 obviously, but they cannot just rely on their

1 own invalidity contentions to then argue that  
2 someone specific actually committed some sort  
3 of misconduct that would rise to the heightened  
4 pleading standard for inequitable conduct here.  
10:58AM 5 THE COURT: All right. Thank you  
6 very much.  
7 If you feel like you need to respond, you  
8 can because we did give them some extra time,  
9 but there's no requirement.  
10:58AM 10 MR. LARSON: First of all, I really  
11 disagree with how you characterize our  
12 discovery. We didn't serve any requests  
13 remotely like that that I recall. And as Your  
14 Honor pointed out, that can be handled on  
15 discovery to the extent the requests are too  
16 broad.  
17 Second, on particular theories of  
18 antitrust, I don't think this is a good forum  
19 to decide the economics of our theories because  
10:58AM 20 Apple primarily argues bright-line rules. We  
21 argued about the bright-line rules. We think  
22 to the extent particular theories are going to  
23 be addressed, they should be addressed with  
24 expert testimony on the economics, if anything  
10:59AM 25 in summary judgment, and you should look at the

1 conduct as a whole, which will be developed at  
2 that time.  
3 And third, Apple mentioned that it  
4 approved our health app, but that was after we  
10:59AM 5 filed a lawsuit, and we mentioned and show in  
6 our complaint a repeated pattern, and certainly  
7 the fact the Apple eventually allowed the app  
8 doesn't undo the harm at the critical moment of  
9 our launch, and certainly doesn't undo the harm  
10:59AM 10 to competition as a whole.  
11 THE COURT: Just to make sure I  
12 understand, sorry, there was a delay in Apple  
13 approving on the App Store, but the app is  
14 approved now?  
10:59AM 15 MR. LARSON: The app is approved now,  
16 but the only thing I would say in our complaint  
17 is not just that there was a delay or they  
18 refused to approve it, it's a pattern we see  
19 where they're seeking confidential information  
10:59AM 20 from it, and they use Section 9.3 of the  
21 agreement that we discussed in our complaint,  
22 which says they can use whatever confidential  
23 information they get for whatever purpose. And  
24 you see a pattern of trying to get the  
10:59AM 25 confidential information. They're directly

1 competing with the Health Watch product.  
2 THE COURT: I understand we're going  
3 outside the pleadings now, but I'm trying to  
4 understand what's going on here. You didn't  
11:00AM 5 give them the confidential information?  
6 MR. LARSON: We did. We resisted  
7 giving them confidential information.  
8 THE COURT: They had it from the  
9 other case; right?  
11:00AM 10 MR. LARSON: Depending on what  
11 confidential information -- we were very  
12 careful about making sure Apple itself did not  
13 have it. And like I said, this is not just us.  
14 It's also Alive Core. In that case, Alive  
11:00AM 15 Core -- Apple was not allowed at all, so  
16 there's a pattern here. We think, certainly,  
17 it's a part of the overall scheme and part of  
18 the overall conduct that we think would be  
19 relevant here in providing analysis of.  
11:00AM 20 THE COURT: You all reminded me that  
21 I've written a lot about antitrust cases, but  
22 I'm still newer to this than I know a lot of  
23 you are. Because this is an attempted  
24 monopolization claim, is it relevant to intent  
11:00AM 25 even though it didn't cause any harm?



1 MR. LARSON: First of all, it would  
2 be relevant to intent, absolutely. Intent is  
3 also shown by conduct in antitrust cases, but  
4 certainly actual intent, evidence taken during  
5 discovery, the actions they engaged in to try  
6 to block us would absolutely be relevant.

7 To clarify, we are also asserting  
8 monopolization. Both monopolization and  
9 alternative attempt at monopolization, the  
10 theory being that even if they don't have  
11 market share now for us to assert that they're  
12 trying to maintain or bolster the monopoly  
13 power, the conduct is such that there's a  
14 dangerous probability that if the scheme were  
15 successful, they would attain that monopoly  
16 power, that market share.

17 THE COURT: Right. But for the  
18 Walker process, that can only be attempted.

19 MR. LARSON: In the *Garden* case it  
20 was both monopolization and attempted  
21 monopolization. And in *TransWeb*, it was  
22 attempted monopolization, which may be what  
23 Your Honor is thinking of. And certainly the  
24 theory the harm that will result if the scheme  
25 is successful is particularly powerful in the

1 be ready to do that for you today, and Monday  
2 is a new federal holiday.

3 So what I'd like to do is have you back  
4 on the phone for me on Tuesday, and that way I  
5 can just read my report and recommendation, and  
6 we'll have the court reporter take it down to  
7 make a record of it. So we'll put on order on  
8 the docket today. I think we'll try to do it  
9 probably mid to late morning, but we'll just  
10 give you the court's dial-in number. If we  
11 could have one attorney for each side to dial  
12 in to receive the ruling, that would be  
13 sufficient.

14 I think that concludes everything. I  
15 know we've got a couple outstanding matters  
16 that have come in on the docket with respect to  
17 the discovery or protective order dispute or  
18 stipulation. We'll get to that as soon as we  
19 can. As you all, I'm sure, are aware, it's a  
20 constant barrage that comes in, so we try to  
21 triage as much as we can.

22 All right. We'll be in recess. Thank  
23 you.  
24  
25

1 attempt -- as to the attempted claim, but we  
2 think it's equally applicable to a  
3 monopolization claim because really the  
4 difference is for attempt, you're looking at  
5 the dangerous probability the scheme will  
6 result in obtaining monopoly power. For  
7 monopolization, you're pointing to the same  
8 conduct but the theory is the conduct will help  
9 maintain the monopoly power as opposed to lose  
10 it or bolster it. They're pled in the  
11 alternative.

12 THE COURT: Monopoly maintenance.  
13 Thank you.

14 So we went a little longer today than we  
15 allotted, but that's okay because I always  
16 enjoy hearing from my learned friends in the  
17 antitrust bar, so here's what I'll say. We  
18 took a lot of time before the hearing today to  
19 try to be repaired for today's hearing, and we  
20 heard the argument today. We're going to go  
21 back and look at some of the cases that you all  
22 referred us to, but I do want to get you an  
23 answer on this, both because it's fresh in my  
24 mind and I also know that discovery is ongoing  
25 and on a short schedule. I'm just not going to

1 C E R T I F I C A T E

2 STATE OF DELAWARE )  
 ) ss:  
3 COUNTY OF NEW CASTLE )

4 I, Deanna L. Warner, a Certified  
5 Shorthand Reporter, do hereby certify that as  
6 such Certified Shorthand Reporter, I was  
7 present at and reported in Stenotype shorthand  
8 the above and foregoing proceedings in Case  
9 Number 22-CV-1377-MN-JLH, *APPLE INC. Vs. MASIMO*  
10 *CORP, et al.*, heard on June 15, 2023.

11 I further certify that a transcript of  
12 my shorthand notes was typed and that the  
13 foregoing transcript, consisting of 56  
14 typewritten pages, is a true copy of said  
15 MOTION HEARING.

16 SIGNED, OFFICIALLY SEALED, and FILED  
17 with the Clerk of the District Court, NEW  
18 CASTLE County, Delaware, this 16th day of June,  
19 2023.  
20  
21

Deanna L. Warner, CSR, #1687  
Speedbudget Enterprises, LLC

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